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MOST people might welcome a change in law that provides relief or benefits which were previously unavailable. However, a new law which deprives individuals of benefits that they could have applied for under an old law or a new law which imposes new disqualifications could have disastrous consequences. In this article, we will examine the effects of new statutes and new decisions on aliens with pending or potential cases.

Let's start with immigration statutes, which are enacted by Congress. If Congress expressly states the date when a statute is to take effect, then this effective date would generally prevail.

For example, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) was enacted on September 30, 1996 but many of its provisions took effect on April 1, 1997. Section 309(a) of IIRIRA stated that Subtitle A of Title III of IIRIRA and its amendments would take effect on April 1, 1997. Thus, INA 212(a)(9)(C), which was enacted pursuant to Section 301(b) of IIRIRA and which makes an alien inadmissible if such alien unlawfully re-enters after he was previously removed or after he was previously present in the US unlawfully for more than a year, took effect on April 1, 1997. This means that any unlawful presence that occurred prior to April 1, 1997 or any unlawful entry prior to April 1, 1997 does not count for purposes of inadmissibility under INA 212(a)(9)(C).

Similarly, INA 212(a)(9)(B), which makes an alien inadmissible if the alien was unlawfully present in the US for certain periods and the alien seeks admission either within 3 or 10 years of the alien's departure, took effect on April 1, 1997. So any unlawful presence that occurred prior to April 1, 1997 would

How do changes in laws affect my immigration case?

not count for purposes of INA 212(a)(9)(B).

Sometimes however, a statute can have consequences for actions that occurred prior to its enactment. For example, INA 241(a)(5) authorizes USCIS to reinstate the prior removal order of an alien who has re-entered the US illegally after he had been removed or had departed voluntarily under an order of removal. Such alien shall be removed at any time after re-entry. INA 241(a)(5) was enacted pursuant to Section 305(a) of IIRIRA and took effect on April 1, 1997. INA 241(a)(5) replaced the old reinstatement provision under INA 242(f). INA 241(a)(5) expanded the class of aliens subject to reinstatement of a prior removal order and while INA 242(f) allowed aliens to apply for relief, INA 241(a)(5) did not.

In *Fernandez-Vargas v. Gonzales*, 548 US 30 (2006), the petitioner questioned whether INA 241(a)(5) would apply to an alien who had re-entered prior to its effective date on April 1, 1997. Petitioner was deported in 1981 but he illegally re-entered in 1982. In 2001, he filed an adjustment of status application based on his US citizen wife's petition but the government instead deported him by reinstating the 1981 deportation order. Petitioner argued that since he re-entered prior to the effective date of INA 241(a)(5), this provision is impermissibly retroactive and should not apply to him.

In *Landgraf v. USI Film Products*, 511 US 244 (1994), Supreme Court explained that a statute does not operate retroactively merely because it is applied in a case arising from conduct occurring before the statute's enactment, or upsets expectations based in prior law. Rather, a statute is impermissibly retroactive if the new provision attaches new legal consequences to events completed before its enactment.

In *Fernandez-Vargas*, the Court applied *Landgraf* and held that

INA 241(a)(5) applies to those who re-entered before this provision took effect because it does not retroactively affect any right or impose any burden on a continuing violator of immigration laws. The Court found that INA 241(a)(5) does not penalize an alien for re-entry but merely establishes a process to remove him under a prior order. Thus, what triggers the application of INA 241(a)(5) is the conduct of remaining in the country after re-entry.

After discussing the effects of new statutes, let us now examine the effects of new decisions. In *James B. Beam Distilling Co. v. Georgia*, 501 US 529 (1991), the Court identified three possible effects. First, a decision may be made fully retroactive, i.e. it would apply to the parties before the court and to all others who may file or against whom relevant claims may be filed. Full retroactivity of a decision is the most common practice.

Second, a decision may be made purely prospective, i.e. the new rule would apply to conduct occurring after the date of that decision but it would not apply to the parties in the case or to those who may file or against whom relevant claims may be filed. Pure prospectivity is the exception but courts must weigh several factors to justify a departure from the normal rule.

Third, a court may apply a new rule in the case in which it is pronounced, then return to the old rule with respect to all cases based on facts that predate the pronouncement. This selective prospectivity is no longer practiced.

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